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JOHN J. COTA

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
JOHN J. COTA,  
  
Defendant.

Case No. CR 08-0160 SI

**DEFENDANT JOHN J. COTA'S NOTICE  
OF MOTION AND MOTION TO SEVER;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

Date: July 18, 2008  
Time: 11:00 a.m.  
Judge: Honorable Susan Illston

Speedy Trial Act; Excludable Time Through  
Disposition; 18 U.S.C. § 3161(h)(1)(F)

**TO UNITED STATES ATTORNEY JOSEPH P. RUSSONIELLO:**

**PLEASE TAKE NOTICE** that at 11:00 a.m. on July 18, 2008 or as soon thereafter as  
counsel may be heard in the above entitled Court, Defendant JOHN J. COTA ("Captain Cota") will  
and hereby does move this Court for an order severing Counts One and Two of the Superseding  
Indictment (for violation of 18 U.S.C. Section 1001), from Count Three (Clean Water Act –

1 Negligent Discharge of a Pollutant) and Count Four (Migratory Bird Treaty Act). The Motion is  
2 brought pursuant to both Fed. R. Crim. P. Rules 8 and 14 of the Federal Rules of Criminal  
3 Procedure. Under Fed. R. Crim. P. Rule 8, Counts One and Two are improperly joined with Counts  
4 Three and Four in that the respective charges are not of the same or similar character, are not based  
5 on the same act or transaction, and/or are not connected with or constitute parts of a common scheme  
6 or plan. Under Fed. R. Crim. P. Rule 14, severance is proper due the risk of prejudice to Captain  
7 Cota if the respective counts are jointly tried.

8 This motion is made based on this Notice of Motion and Motion, the attached Memorandum  
9 of Points and Authorities and exhibits in support thereof, the complete files and records in this  
10 matter, and upon such other matters as may be presented to the Court at the time of the hearing.

11 Respectfully submitted,

12  
13 Dated: June 13, 2008.

KIRKPATRICK & LOCKHART  
PRESTON GATES ELLIS LLP

14  
15 By /s/ Jeffrey L. Bornstein  
16 Jeffrey L. Bornstein, Esq.  
17 Barry M. Hartman, Esq., *Admitted Pro Hac Vice*  
18 Luke G. Anderson, Esq.  
19 Christopher R. Tate, Esq., *Pro Hac Vice pending*

20 Attorneys for Defendant  
21 JOHN J. COTA  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION.**

The government in this action charges Captain Cota with two very distinct crimes: (1) with providing incomplete information during an annual State mandated pilot's physical examination, and (2) with negligently operating a vessel that resulted in the leaking of fuel oil as a result of the M/V COSCO BUSAN's accident on November 7, 2007. In its indictment, the government does not allege any connection or causal link between these offenses. Rather, the offenses stand as discrete allegations, far separated both in fact and in time.

Fed. R. Crim P. 8 requires severance of offenses that are, not of the same character, not based on the same "transaction," and/or not dependent on the same evidence. Fed. R. Crim. P. 14, further, requires severance where, as here, joinder will result in undue prejudice to the defendant. The fact that the Bay Bridge accident and resulting oil spill has been publicly and repeatedly blamed on Captain Cota is extremely prejudicial especially as it relates to the false statement counts. Even though the United States must admit that there is no linkage between these events, it is unlikely that a juror will not try to infer a connection (even with careful jury instructions). That inference, even though it is unfounded, would be overwhelmingly prejudicial to Captain Cota's defense. Though severance is proper under either Rule 8 or Rule 14, here it is proper under both.

**II. STATEMENT OF FACTS.**

On the morning of November 7, 2007, the cargo vessel M/V COSCO BUSAN ("COSCO BUSAN") scraped the San Francisco Bay Bridge fendering system, damaging the ship's hull and puncturing a fuel tank, thereby causing oil to spill from the vessel into the San Francisco Bay. During the incident, Captain Cota was onboard the COSCO BUSAN as an advisory pilot. Within two hours of the incident, Captain Cota was given a drug and alcohol test – the results were negative. Exhibit A (Drug and Alcohol Test Results).

By an Information dated March 17, 2008, the United States Attorney's office initially charged Captain Cota with two misdemeanor counts: (i) negligence under the Clean Water Act and (ii) strict liability under the Migratory Bird Treaty Act. On April 22, 2008, the Grand Jury filed a

1 Superseding Indictment adding two false statement counts arising out of Captain Cota's State  
2 mandated medical examinations in January 2006 and January 2007.

3 Under the Clean Water Act, the government alleges that Captain Cota "negligently caused  
4 more than 50,000 gallons of heavy fuel oil to be discharged from the vessel into San Francisco Bay"  
5 by: "(a) failing to pilot a collision free course; (b) failing to adequately review with the Captain and  
6 crew of the *M/V Cosco Busan* prior to departure the official navigational charts of the proposed  
7 course, the location of the San Francisco Bay aids to navigation, and the operation of the vessel's  
8 navigational equipment; (c) departing port in heavy fog and then failing to proceed at a safe speed  
9 during the voyage despite limited visibility; (d) failing to use the vessel's radar while making the  
10 final approach to the Bay Bridge; (e) failing to use positional fixes during the voyage; and (f) failing  
11 to verify the vessel's position vis-à-vis other established and recognized aids to navigation  
12 throughout the voyage." See Superseding Indictment, page 6, ¶ 18. The Migratory Bird Treaty Act  
13 alleges solely that Captain Cota "did take migratory birds" without being permitted to do so by  
14 regulation. See Superseding Indictment, page 7, ¶ 20.

15 The two false statement counts allege violations of 18 U.S.C. § 1001, making materially false  
16 statements in a matter within the jurisdiction of a federal department or agency. The false statement  
17 counts allege that, on January 18, 2006 and January 19, 2007, Captain Cota "knowingly and  
18 willfully made a materially false, fictitious, and fraudulent statement and representation in a matter  
19 within the jurisdiction of the executive branch of the Government of the United States, specifically  
20 on United States Coast Guard Form CG-719K – Merchant Mariner Physical Examination Report –  
21 in that he certified that all the information he provided was complete and true to the best of his  
22 knowledge, when in fact he knew that the information he provided was neither complete nor true;  
23 including the information provided in Sections VI and VII of the form regarding current  
24 medications, the dosage, possible side effects and medical conditions for which the medications are  
25 taken." See Superseding Indictment, page 4, ¶ 14, page 5, ¶ 16.

26 Importantly, the Superseding Indictment does not allege any connection between the false  
27 statement charges and the two original counts for negligence under the Clean Water Act and  
28

1 violation of the Migratory Bird Treaty Act. In fact, nowhere does the government allege any  
 2 connection at all between Captain Cota's alleged false statements and the COSCO BUSAN accident  
 3 itself.

### 4 **III. LEGAL ARGUMENT.**

#### 5 **A. Pursuant To Fed R. Crim. P. Rule 8, The Felony And Misdemeanor Counts** 6 **Should Be Severed Due To Their Lack Of Commonality.**

7 Under Rule 8 of the Federal Rules of Criminal Procedure, two offenses may be joined in an  
 8 indictment only if the offenses "are of the same or similar character, or are based on the same act or  
 9 transaction, or are connected with or constitute parts of a common scheme or plan." Fed. R. Crim. P.  
 10 8(a); *United States v. Terry*, 911 F.2d 272, 276 (9th Cir. 1990). Specifically, "[t]wo crimes are  
 11 connected together if the proof of one crime constitutes a substantial portion of the proof of  
 12 another." When joined offenses "are not connected and are not provable by the same evidence,  
 13 joinder is improper." *Terry*, 911 F.2d at 276 (9th Cir. 1990). Under Rule 8, "the validity of joinder  
 14 is determined solely by the allegations in the indictment" as a matter of law. *Id.*; [See also *United*  
 15 *States v. Chavez*, 296 F.3d 450, 456 (6<sup>th</sup> Cir. 2002): "Misjoinder of offenses...raises only a question  
 16 of law. If there has been a misjoinder, the trial court has no discretion to deny the motion" for  
 17 severance.]

18 The *Terry* case is instructive. In *Terry*, the defendant was charged with two counts of  
 19 violating federal narcotics laws and one count of violating federal firearms laws. The drug charges  
 20 arose out of an incident on June 9, 1988 in San Joaquin County, whereas the firearm charge arose  
 21 nineteen days later in a different county. In reversing the trial court's denial of defendant's motion  
 22 to sever the counts, the Ninth Circuit found that the indictment failed to allege "any commonality"  
 23 between the drug and firearm charges, nor did it even suggest that "the offenses are of the same or  
 24 similar character or that they are part of the same transaction or parts of a common scheme." *Id.* at  
 25 276. The Court noted that, in every case cited by the government in favor of joinder, the firearm was  
 26 discovered *at the same time and place* as the drugs. The Court also rejected the government's  
 27 argument that firearms are "integrally related to drug trafficking." Finally, the Court found that the  
 28 proof of the offenses depended on different evidence. *Id.*

1 As in *Terry*, the Superseding Indictment here fails to establish, or even allege, any  
2 commonality between the negligence and Migratory Bird counts, on the one hand, and the felony  
3 false statement charges, on the other. There is no allegation that the alleged false statements caused  
4 or contributed to Captain Cota's alleged negligence or, for that matter, caused or contributed to the  
5 COSCO BUSAN accident itself.<sup>1</sup> Rather, the false statement offenses are pled as discrete counts,  
6 separated in time from the COSCO BUSAN accident by 10 months (for the January 2007 physical  
7 examination) and as much as 22 months (for the January 2006 physical examination).

8 Further, as in *Terry*, attempting to prove the misdemeanor and felony counts will require the  
9 presentation of different evidence. For example, the government's negligence claim, as described in  
10 the Superseding Indictment, focuses on the specific on-board events of November 7, 2007, such as  
11 communication lapses among the crew and inadequate use of charts, radar, fixes and navigational  
12 aids. The purported evidence in support of that claim will therefore center on the period of time  
13 starting on October 24, 2007, when the crew took over the COSCO BUSAN, including the events on  
14 the day of the accident and the post-accident interactions between the crew and the government. By  
15 contrast, the evidence allegedly in support of the false statement claims will focus on (i) Captain  
16 Cota's medical examinations before Dr. Calza, the examining physician in January 2006 and January  
17 2007, (ii) the Coast Guards' on-going efforts to clarify for mariners and physicians what needs to be  
18 disclosed during such exams and (iii) other aspects of the State and Federal oversight and licensing  
19 process. This evidence has no bearing on the government's ability to prove up its negligence claim  
20 and vice versa.

21 For these reasons, the misdemeanor and felony counts of the Superseding Indictment have  
22 been improperly joined under Rule 8 and should be severed for trial.

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27 <sup>1</sup> Although the Superseding Indictment is void of any alleged connection between the purported false  
28 statements and the COSCO BUSAN incident, it is worth noting that the results of Captain Cota's  
post-incident drug tests were negative for any substances, including opiates (ie. Codeine) or alcohol.  
See Exhibit A.

1           **B.     Alternatively, The Felony And Misdemeanor Counts Should Be Severed Due To**  
2           **Prejudice To Defendant Under Fed R. Crim. P. Rule 14.**

3           Rule 14 of the Federal Rules of Criminal Procedure recognizes that joinder, even if proper  
4           under Rule 8, may nonetheless require severance due to prejudice to the defendant: “If it appears  
5           that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an  
6           indictment or information or by such joinder for trial together, the court may order an election of  
7           separate trials of counts, grant a severance of defendants or provide whatever other relief justice  
8           requires.” Fed. R. Crim. P. 14. There is a “high risk of undue prejudice whenever...joinder of  
9           counts allows evidence of other crimes to be introduced in a trial of charges with respect to which  
10          the evidence would otherwise be inadmissible.” *United States v. Lewis*, 787 F.2d 1318, 1321 (9<sup>th</sup>  
11          Cir. 1986).

12          In the present case, there is a grave risk to Captain Cota’s right to receive a fair trial on the  
13          felony false statements charges if they are tried in the same proceeding as the misdemeanor  
14          negligence claim. In the negligence count, the government will seek to pin sole responsibility for the  
15          COSCO BUSAN incident on Captain Cota. He has already been vilified by the Coast Guard and in  
16          the media based on the oil spill. It has been widely reported that the spill threatened local marine life  
17          and required a costly clean-up effort. It is simply asking too much of a jury to compartmentalize  
18          these facts and images when deliberating on the false statement charges. The risk of undue influence  
19          and prejudice is too great, particularly in light of the fact that the false statement and negligence  
20          claims are not related and involve distinct acts far separated in time, as set forth above. Under these  
21          circumstances, the Court should exercise its discretion to sever these claims so as to preserve  
22          Captain Cota’s fundamental right to a fair trial.

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1 **IV. CONCLUSION.**

2 For the foregoing reasons, Captain Cota respectfully requests that the Court sever the felony  
3 false statement counts from the misdemeanor negligence and Migratory Bird Treaty Act claims.

4 Dated: June 13, 2008.

KIRKPATRICK & LOCKHART  
PRESTON GATES ELLIS LLP

6 By /s/ Jeffrey L. Bornstein.  
7 Jeffrey L. Bornstein, Esq.  
8 Barry M. Hartman, Esq., *Admitted Pro Hac Vice*  
9 Luke G. Anderson, Esq.  
10 Christopher R. Tate, Esq., *Pro Hac Vice pending*

11 Attorneys for Defendant  
12 JOHN J. COTA  
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SAN FRANCISCO BAR PILOTS SAN376  
PIER 9 EAST END  
SAN FRANCISCO, CA 94111

Reported Date: Nov 8, 2007

Sample Id: 3828137	Client Id: 66387
Employee Id: 553683968	Employee Name: JOHN J COTA
Chain of Custody: 1510699	Test Reason: Post Accident
Collection Date: Nov 7, 2007	Regulation: USCG
Date MRO received CCF Copy 2 (F): Nov 7, 2007	
Date MRO received CCF Copy 2 (H): Nov 21, 2007	
Test Panel: 5 Panel Split Specimen (AmphCocOpiPcpThc)	
Collection Site: GLOBAL DRUG & ALC SCREENING (53731)	
Laboratory: QUEST DIAGNOSTICS	

Drug Name	Result
Amphetamines	Negative
Cocaine	Negative
Opiates	Negative
Phencyclidine	Negative
Marijuana	Negative

Discrepancies:

Verify Date: Nov 8, 2007

I have reviewed the laboratory results for the specimen identified by this form in accordance with applicable requirements. My Determination/Verification is:

Negative



John Womack, M.D.  
Medical Review Officer

Print By: franblack@sfbarpilots.com Print Date: Feb 28, 2008

Top

## U.S. Department of Transportation (DOT)

## Alcohol Testing Form

(The instructions for completing this form are on the reverse side.)

STEP 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A. Employee Name John COTA  
(Print) (Last, First, Middle Initial)

B. SSN or Employee ID No. 68-3968

C. Employer Name San Francisco Bay Bridge  
Street San Francisco, CA 94111  
City, ST ZIP

DER Name and Telephone No. (415) 367-5436  
DER Phone Number

D. Reason for Test ☒ Pre-employment ☐ Post-Accident ☐ Follow-up ☐ Pre-Employment

ALCOTEST 7410 PLUS  
SERIAL NUMBER: APTA-Q355ALCOTEST 7410 PRINTER  
SERIAL NUMBER: ARXE-0047  
DATE: 11/9/2007

SEQUENTIAL TEST #: 00602

AIR BLANK 0.000 10:29

BREATH TEST 0.000 10:29

ACCURACY  
UNITS: 10AC TIME  
BAT SIGNATURE:

## STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I have read and understand the U.S. Department of Transportation regulations and that I have signed this form and correct.

Signature of Employee [Signature] Date 11/9/07

## STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

I, the technician, certify that the testing was performed by me or by a technician who was conducting the confirmation test. I certify that the results of the test were recorded on the above named employee's record card in the procedures established in the U.S. Department of Transportation regulation 49 CFR 391.21. I am not permitted to operate the testing device (automated) and that the results are as recorded.

TESTING METHOD: ☒ BREATH ☐ ST. DEVICE ☐ SALIVA ☐ BREATH 10-Minute Wash ☐ No Wash ☐ No Wash

CONFIRMATION TEST: ☐ Results of test are as recorded on the form, or printed directly on the form.

Remarks:

GDA 449 15th Street  
Company Street Address Oakland, CA (510) 367-5436  
Company City, State, Zip Phone Number

Signature of Alcohol Technician [Signature] Date 11/9/07

## STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULTING IN A 0.08 OR HIGHER

I certify that I have read and understand the results of which I am not permitted to drive a motor vehicle, or operate heavy equipment, because the results are 0.08 or higher.

Signature of Employee [Signature] Date 11/9/07